SERVED: March 8, 1996

NTSB Order No. EA-4434

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of February, 1996

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. MICHAEL H. DAYBERRY, Respondent.	Docket SE-14041

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued on August 14, 1995, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.123(a) and 91.13(a).[2] The

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]§ 91.123 provides:

law judge, however, reduced the Administrator's 30-day proposed suspension to 20 days, a reduction the Administrator has not appealed. We deny the appeal.

Respondent was the pilot and sole occupant of a Cessna 441 Conquest II he was flying from Columbia, SC to Winston-Salem, NC. A Greensboro, NC, air traffic controller, Stephen Swinehart, testified (and there was no dispute) that he cleared respondent to descend to and maintain 7,000 feet. According to Mr. Swinehart, he was performing other duties when respondent, some short time later, called to verify his clearance.[3] Mr. Swinehart noticed that respondent had descended past the cleared altitude of 7,000 feet to 5,800 feet.

The controller did not notify respondent that he had deviated from his clearance, having believed, according to his testimony at the hearing, that respondent already knew. Mr. Swinehart proceeded to give respondent a clearance to 4,000 feet. At the time the controller noticed the deviation on his radar screen, he testified that respondent's aircraft had only 1 and 1/2 miles horizontal and 200 feet vertical clearance from another

(..continued)

> (a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained.

§ 91.13 **Careless or reckless operations**.

> (a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]The transcript entered in evidence contains no times.

aircraft, but that they were proceeding in diverging directions and the other aircraft had respondent in sight.[4]

Respondent, in his defense, stated that the aircraft had had problems with its altitude preselector in the past. He further testified, however, that he had seen no problem with it on that trip. Tr. at 60, 62. He also testified that he had not reached 7,000 feet when he received the clearance to descend to 4,000. He stated that, with the preselector set to 7,000, he would have received aural and visual warnings if he had deviated as alleged, and that there were no such warnings.[5]

The law judge, faced with conflicting accounts, found Mr. Swinehart to be "a completely reliable witness." Tr. at 102. The law judge rejected, as unsupported, respondent's claim of altitude preselector malfunction, while at the same time noting respondent's own inconsistent testimony on this point, and he noted the lack of evidence that respondent's altimeters, his transponders, or any ATC equipment had malfunctioned. The law judge commented:

Respondent testified instead that he did not descend below

[4]Thus, he stated, he did not need to take preventive action. (Standard separation is 3 miles horizontal and 1,000 feet vertical.)

[5]The Administrator also introduced a tape of the conversations between respondent and Mr. Swinehart. According to Mr. Swinehart, respondent, when told of the 7,000 foot clearance, answered "I'm sorry." Respondent, in contrast, claims that his answer was "9 whiskey charlie." (His aircraft's number was N489WC.) The law judge listened to the tape and concluded that respondent had said "I'm sorry," but stated that he would not consider it an admission against interest. Tr. at 35, 96.

> 7,000 feet until after he had verified the previous 7,000 foot clearance and received a new clearance to 4,000 feet. Other than saying that he set his altitude preselector to 7,000 feet he did not say how he knew what his altitude was when he asked for verification of the first clearance to 7,000 feet, which he admits to having received and acknowledged. Based upon his testimony it is unclear as to whether or not he actually knew or how he knew what his altitude was when he asked air traffic control for verification of its [sic] clearance, even assuming that verification was the reason that he asked ATC to repeat the earlier clearance.

Id. at 101. The law judge specifically found that, when respondent asked ATC to verify his clearance, he was already 1,200 feet below his assigned altitude, and that the further clearance to 4,000 feet was given at that time. Tr. at 102.

On appeal, respondent reiterates arguments made to and rejected by the law judge, and we see no grounds to reverse his decision. The law judge had the opportunity to observe the two witnesses, and respondent has offered no reason to overturn the law judge's credibility analysis. Administrator v. Smith, 5 NTSB 1560, 1563 (1987).

Respondent offers new evidence not presented to the law judge, and the Administrator has asked that it, and two documents attached to respondent's brief, be stricken. We agree. Respondent had the opportunity to present all this matter at trial and failed to do so. He has offered no adequate reason for that failure. Disagreement or dissatisfaction with counsel is not sufficient basis. Administrator v. Brown, 6 NTSB 1339 (1989). While our law judges and the Board give great leeway to pro se respondents, this leeway does not extend to waiving basic procedural requirements, nor does the situation before us compel

remand for a new trial (as respondent urges) on due process grounds.

Even were we to consider all respondent's new claims, they do not warrant reversal of the law judge's decision. Respondent's equipment-related claims remain unsupported. Even the work order he submits proves only that the transponders were removed 4 months after the incident, not that the aircraft's instruments sent incorrect altitude information to ATC on the date in question and that the aircraft was actually above 7,000 feet but showed at 5,800 feet on the ATC radar. Similarly, neither respondent's report of conversations with FAA personnel, including during the informal conference, nor his report of other conversations with attorneys and pilots are persuasive evidence that, on December 14, 1992, respondent did not descend below his assigned altitude.[6]

[6]Respondent's arguments that the law judge should not have read the transcript before he listened to the tape, and that the transcript was unreliable because it was prepared by an ex-girlfriend, are also unconvincing. It also does not appear, as respondent argues, that the position of the two aircraft required the controller to issue a safety alert. (Respondent is apparently suggesting that the controller's testimony is not reliable because, if the events actually occurred as he testified, he would have issued a safety alert.) The aircraft were moving in opposite directions and the other aircraft had respondent in sight.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to strike is granted;

2. Respondent's appeal is denied; and

3. The 20-day suspension of respondent's airman certificate shall commence 30 days after service of this order.[7]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.

[7]For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to 14 C.F.R. 61.19(f).